Lombard Commodities Ltd v Alami Vegetable Oil Products Sdn Bhd

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(F)-37 OF 2008(W)
ARIFIN ZAKARIA CJ (MALAYA), HASHIM YUSOFF AND GOPAL SRI RAM FCJJ
3 NOVEMBER 2009

Arbitration — Award — Foreign award — No Gazette Notification declaring UK as party to New York Convention — Whether UK award could be enforced in Malaysia — Whether s 2(2) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985 could be construed as mandatory requirement before award could be enforced in Malaysia — Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985 ss 2(2), 3 & 5

Lombard Commodities Ltd, the appellant commenced arbitration proceedings against Alami Vegetable Oil Products Sdn Bhd, pursuant to an arbitration agreement between the parties. The seat of arbitration in this case was in London. An English arbitrator appointed by the appellant was the sole arbitrator because the respondent failed and/or neglected to appoint an arbitrator. The English arbitrator found for the appellant and the respondent was adjudged to pay the appellant the sum of USD135,623.96 with interest ('the award'). As the award was made at a foreign seat of arbitration, the appellant filed an application at the High Court to enforce the arbitral award in Malaysia. The High Court in reliance on s 27 of the Arbitration Act and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985 ('CREFA') ordered the enforcement of the foreign award. The respondent filed an appeal in the Court of Appeal and argued for the first time that the award was unenforceable because there was no *Gazette* notification made under s 2(2) of the CREFA declaring the UK as a party to the New York Convention ('NYC') and that therefore the appellant could not rely on the CREFA to enforce the award. The respondent submitted that the appellant must be able to satisfy the Malaysian court that the award was published in a country that is a party to the NYC and this required having to produce to the court an order made by the Yang di-Pertuan Agong and published in the *Gazette*. It was thus the respondent's contention that if there was no order in the *Gazette* there was no conclusive evidence that the country in question was a party to the NYC. The appellant contended that it was not mandatory for a *Gazette* notification to be issued before a country or state can

qualify as a contracting state under the NYC. The Court of Appeal in reliance on its earlier decision in *Sri Lanka Cricket (formerly known as Board of Control for Cricket in Sri Langka) v World Sport Nimbus Pte Ltd (formerly known as WSG Nimbus Pte Ltd* [2006] 3 MLJ 117 ('the *Sri Lanka Cricket* case') held that since no *Gazette* notification had been issued by the Yang di-Pertuan Agong under s 2(2) of the CREFA declaring the UK to be a party to the NYC the award could not be registered and enforced as a convention award under the CREFA. The appellant was granted leave to proceed with the instant appeal which in essence involved the sole issue as to whether the failure of the Yang di-Pertuan Agong under s 2(2) of the CREFA to declare the UK to be a party to the NYC rendered the award unenforceable in Malaysia, notwithstanding the fact that all the other conditions required for its enforcement had been satisfied.

Held, allowing the appeal with costs here and courts:

(1) (per **Arifin Zakaria CJ (Malaya)**) Section 2(2) of the CREFA is not an interpretation provision but an evidential provision. As an evidential provision, it merely provides that if the Yang di-Pertuan Agong has issued a *Gazette* notification declaring a particular state to be a contracting state, then that notification formed conclusive evidence of the fact that the state was a contracting state under the NYC. Therefore the issue as to whether a state is a party to the NYC can be proved by adducing other evidence as may be appropriate. In the present case it was never in dispute that the UK is a contracting state under the NYC. Thus, the fact that no *Gazette* notification was ever issued by Yang di-Pertuan Agong should not be an issue. The only issue for the court to be satisfied was whether, on the date the appellant applied to register the award, the UK was a contracting party under the NYC (see paras 23, 29 & 31).

(2) (per **Arifin Zakaria CJ (Malaya)**) The fact that s 2(2) of the CREFA was inserted in the interpretation section further fortified the fact that it was not intended to form part of the substantive provisions of the Act. At the same time, the legislative intent is clearly declared in the preamble to the Act (see paras 30 & 32).

(3) (per **Arifin Zakaria CJ (Malaya)**) Considering ss 3 and 5 of the CREFA together with Article 111 of the NYC, it can be seen that enforcement of the convention award may only be refused in the circumstances set out in s 5 of the CREFA. As such the CREFA intended to allow the convention award to be enforceable in the country as if it was a domestic award. The Court of Appeal's decision in the *Sri Lanka Cricket case* would have the effect of imposing an additional condition before a convention award could be enforced in

this country and this would be contrary to the stated object and purpose of CREFA. Thus the *Gazette* notification under s 2(2) of the CREFA could not be construed as a mandatory requirement before the convention award could be enforced within Malaysia (see paras 36, 39–41).

(4) (per **Arifin Zakaria CJ (Malaya)**) The respondent had never participated in the arbitration proceedings in London and ought to have applied to the English courts as the courts of supervisory jurisdiction to have the award set aside instead of raising the issue before the Malaysian court which is only the court of enforcement (see para 42).

(5) (per **Gopal Sri Ram FCJ**, dissenting) In the instant case, there was no order in the *Gazette* and hence the summary procedure for enforcement of a foreign convention award in Malaysia was not available. Applying the *Sri Lanka Cricket* case, there was no conclusive evidence that the UK was a party to the NYC and the appellant could not rely on CREFA to enforce the award (see para 52).

[Bahasa Malaysia summary

Perayu, Lombard Commodities Ltd memulakan prosiding timbang tara terhadap Alami Vegetable Oil Products Sdn Bhd, berikutan dengan perjanjian timbang tara antara pihak-pihak tersebut. Tempat timbang tara bagi kes ini ialah di London. Seorang Bangsa Inggeris dilantik sebagai penimbangtara oleh perayu yang merupakan satu-satunya penimbangtara kerana responden gagal dan/atau cuai melantik seorang penimbangtara. Penimbangtara Bangsa Inggeris tersebut memutuskan bagi pihak perayu dan responden diputuskan membayar perayu sejumlah USD135,623.96 dengan faedah ('award tersebut'). Memandangkan award tersebut dibuat di tempat timbang tara asing, perayu memfailkan satu permohonan di Mahkamah Tinggi untuk pelaksanaan award timbang tara tersebut di Malaysia. Mahkamah Tinggi menggunapakai s 27 Akta Timbang Tara 2005 dan juga Akta Konvensyen mengenai Pengiktirafan dan Penguatkuasaan Award Timbangtara Asing 1985 ('AKPPTA') memerintahkan perlaksanaan award asing tersebut. Responden memfailkan rayuan di Mahkamah Rayuan dan menghujahkan pertama kalinya bahawa award tersebut tidak boleh dilaksanakan kerana tiada warta pemberitahuan dibuat di bawah s 2(2) AKPPTA mengisytiharkan UK sebagai salah satu pihak kepada Konvensyen New York ('KNY') dan oleh itu, perayu tidak boleh bergantung kepada AKPPTA untuk melaksanakan award tersebut. Responden menyatakan bahawa perayu mestilah mematuhi mahkamah Malaysia bahawa award tersebut dikeluarkan oleh negara yang merupakan pihak kepada KNY dan award tersebut dikehendaki dikemukakan di mahkamah untuk suatu

perintah yang dikeluarkan oleh Yang diPertuan Agong dan diwartakan. Maka adalah menjadi hujahan responden bahawa jika tiada perintah dalam warta, tiada keterangan kukuh bahawa negara tersebut merupakan pihak kepada KNY. Perayu pula berhujah bahawa tidaklah mandatori untuk suatu warta pemberitahuan dikeluarkan sebelum sebuah negara atau negeri boleh diiktiraf sebagai negara pejanji di bawah KNY. Mahkamah Rayuan menggunapakai keputusannya yang terdahulu dalam kes *Sri Lanka Cricket (formerly known as Board of Control for Cricket in Sri Langka) v World Sport Nimbus Pte Ltd (formerly known as WSG Nimbus Pte Ltd* [2006] 3 MLJ 117 ('kes *Sri Lanka Cricket*') yang memutuskan bahawa memandangkan tiada warta pemberitahuan dikeluarkan oleh Yang diPertuan Agong di bawah s 2(2) AKPPTA yang mengisytiharkan UK sebagai pihak kepada KNY award tersebut tidak boleh didaftar dan dilaksanakan sebagai award konvensyen di bawah AKPPTA. Perayu diberikan keizinan untuk meneruskan dengan rayuan ini yang mana intipatinya adalah berkaitan dengan satu-satunya isu sama ada kegagalan Yang diPertuan Agong di bawah s 2(2) AKPPTA mengisytiharkan UK sebagai pihak kepada KNY menjadikan award tersebut tidak dapat dilaksanakan di Malaysia, walaupun kesemua syarat yang dikehendaki telah dipenuhi.

Diputuskan, membenarkan rayuan dengan kos di mahkamah ini, mahkamah Rayuan dan Mahkamah Tinggi:

(1) (oleh **Arifin Zakaria HB (Malaya)**) Seksyen 2(2) AKPPTA bukanlah peruntukan interpretasi tetapi peruntukan keterangan. Sebagai peruntukan keterangan, peruntukan tersebut hanyalah memperuntukkan bahawa jika Yang diPertuan Agong telah mengeluarkan warta pemberitahuan mengisytiharkan suatu negara merupakan negara pejanji, maka pemberitahuan tersebut menjadi keterangan kukuh bahawa negara tersebut merupakan negara pejanji KNY tersebut. Maka isu sama ada suatu negara merupakan negara pejanji KNY boleh dibuktikan dengan mengemukakan keterangan lain yang mungkin bersesuaian. Dalam kes ini, tidak pernah dipertikaikan bahawa UK adalah negara pejanji di bawah KNY. Oleh itu, fakta bahawa tiada warta pemberitahuan yang pernah dikeluarkan oleh Yang diPertuan Agong tidak harus menjadi isu. Isu yang harus dipenuhi oleh mahkamah adalah sama ada, pada tarikh perayu memohon untuk mendaftarkan award tersebut, UK merupakan negara pejanji di bawah KNY (lihat perenggan 23, 29 & 31).

(2) (oleh **Arifin Zakaria HB (Malaya)**) Fakta bahawa s 2(2) AKPPTA dimasukkan dalam seksyen pentafsiran menegaskan fakta bahawa peruntukan tersebut tidak bertujuan menjadi peruntukan substantif

Akta tersebut. Pada masa yang sama tujuan perundangan jelas dinyatakan dalam mukadimah Akta tersebut (lihat perenggan 30 & 32).

(3) (oleh **Arifin Zakaria HB (Malaya)**) Melihat kepada ss 3 dan 5 AKPPTA bersama dengan perkara 111 KNY adalah jelas bahawa pelaksanaan award konvensyen tersebut hanya boleh ditolak dalam keadaan-keadaan yang dinyatakan dalam s 5 AKPPTA. Oleh itu, AKPPTA tersebut bertujuan untuk membenarkan award konvensyen tersebut boleh dilaksanakan di negara itu sebagaimana ia adalah award domestik. Keputusan Mahkamah Rayuan dalam kes *Sri Lanka Cricket* mengakibatkan syarat-syarat tambahan perlu dikenakan sebelum suatu award konvensyen boleh dilaksanakan di negara ini dan ini tentunya bercanggah dengan objektif dan tujuan AKPPTA. Maka, warta pemberitahuan di bawah s 2(2) AKPPTA tidak boleh ditafsirkan sebagai kehendak mandatori sebelum suatu award konvensyen boleh dilaksanakan di Malaysia (lihat perenggan 36, 39–41).

(4) (oleh **Arifin Zakaria HB (Malaya)**) Responden tidak pernah mengambil bahagian dalam prosiding timbang tara di London dan seharusnya memohon ke mahkamah Inggeris sebagai mahkamah yang mempunyai bidang kuasa penyeliaan untuk mengetepikan award tersebut daripada membangkitkan isu tersebut di hadapan mahkamah di Malaysia yang mana hanyalah merupakan mahkamah untuk perlaksanaan (lihat perenggan 42).

(5) (oleh **Gopal Sri Ram HMP**, menentang) Dalam kes ini, tiada perintah dalam warta dan oleh itu tiada prosedur terus untuk perlaksanaan award konvensyen asing di Malaysia. Menggunapakai kes *Sri Lanka Cricket*, tiada keterangan kukuh bahawa UK merupakan pihak kepada KNY dan perayu tidak boleh bergantung kepada AKPPTA untuk melaksanakan award tersebut (lihat perenggan 52).]

Notes

For cases on foreign award, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1332–1334.

Cases referred to

A v B & Ors (No 2) [2007] 1 Lloyd's Rep 358, QBD (refd)

Baker, Re; Nichols v Baker (1890) 44 Ch D 262, CA (refd)

Hebei Import & Export Corp v Polytek Engineering Co Ltd [1999] 2 HKC 205 (refd)

Kelly v R (2004) 205 ALR 274, HC (refd)

Minister of Public Works of the Government of Kuwait v Sir Fredrick Snow and Partners [1981] 1 Lloyd's Rep 656 (refd)

Overseers of West Ham v Iles (1883) 8 App Cas 386 (refd)

Sabah Gas Industries Sdn Bhd v Trans Samudera Lines (S) Sdn Bhd [1993] 2 MLJ 396, HC (refd)

Sri Lanka Cricket (formerly known as Board of Control for Cricket in Sri Langka) v World Sport Nimbus Pte Ltd (formerly known as WSG Nimbus Pte Ltd [2006] 3 MLJ 117; [2006] 2 CLJ 316, CA (refd)

Tun Dato Haji Mustapha bin Datu Harun v Tun Datuk Haji Mohamed Adnan Robert, Yang Di-pertua Negeri Sabah & Datuk Joseph Pairin Kitingan (No 2) [1986] 2 MLJ 420, HC (refd)

Legislation referred to

Arbitration Act 1952 (repealed) s 27
Arbitration Act 1975 [UK] ss 7(2), 17
Chief Minister (Incorporation) Ordinance of Sabah s 5
Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985 (repealed) ss 2(1), (2), 3, 3(1), 4, 4(b), 5, Schedule, Articles 1(3), III, IV, V, 111
Reciprocal Enforcement of Judgments Act 1958

Appeal from: Civil Appeal No W-02–449 of 2005 (Court of Appeal, Putrajaya)

M Nagarajah (Tanya Lopez with him) (Shook Lin & Bok) for the appellant.
Firoz Hussein (Shanti Abraham with him) (Puthucheary Firoz & Mai) for the respondent.

Arifin Zakaria CJ (Malaya):

INTRODUCTION

[1] This appeal is directed against the order of the Court of Appeal on 28 January 2008 which set aside the appellant's registration of a final arbitration award dated 10 July 2002 for the sum of USD135,623.96 ('the said award').

BACKGROUND FACTS

[2] The facts are not in dispute. They are as follows: the appellant commenced an arbitration proceedings against the respondent in London for demurrage in the sum of USD135,623.96 together with interest and costs.

[3] The action was commenced pursuant to an arbitration agreement contained in cl 30 of the additional clauses to the carter party dated 22 September 2000 between the appellant and the respondent, which by the same clause was expressed to be governed by English law.

[4] The appellant appointed Mr David Barnett as the arbitrator. The respondent, had failed, neglected and/or refused to appoint an arbitrator. Mr David Barnett was appointed as the sole arbitrator pursuant to s 17 of the United Kingdom's Arbitration Act 1975.

[5] On 10 July 2002, Mr David Barnett awarded and adjudged that the respondent was to pay the appellant the sum of USD135,623.96 together with interest on the said sum at the rate of 7%pa compounded with quarterly rests.

[6] The appellant filed an application at the High Court pursuant to s 27 of the Arbitration Act 1952 to enforce the said award.

THE DECISION OF THE HIGH COURT

[7] The learned High Court judge gave leave and ordered the enforcement of the said award against the respondent in reliance on s 27 of the Arbitration Act 1952 and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985 ('CREFA').

THE CONTENTIONS BEFORE THE COURT OF APPEAL

[8] The respondent filed an appeal at the Court of Appeal. It was argued for the first time in the Court of Appeal that the said award is unenforceable on the ground that United Kingdom has not been gazetted under s 2(2) of the CREFA.

[9] The appellant, on the other hand, contended that the said provision does not make it mandatory for a *gazette* notification to be issued before a state can qualify as a contracting state under the New York Convention ('NYC').

THE DECISION OF THE COURT OF APPEAL

[10] On 28 January 2008, the Court of Appeal allowed the appeal by the respondent. The appellant's registration of the said award was set aside on the basis that since no *Gazette* notification has been issued by the Yang di-Pertuan Agong under s 2(2) of the CREFA declaring that the United Kingdom is a contracting state under the NYC; the said award cannot be registered and enforced as a convention award under the CREFA. In coming to this conclusion, the Court of Appeal relied on its earlier decision in *Sri Lanka Cricket (formerly known as Board of Control for Cricket in Sri Langka) v World Sport Nimbus Pte Ltd (formerly known as WSG Nimbus Pte Ltd* [2006] 3 MLJ

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LEAVE QUESTIONS

[11] On 8 September 2008, leave to appeal was granted by this court to the appellant on the following questions of law:

(a) whether the failure to declare the United Kingdom as a party to the New York Convention by way of *Gazette* notification under s 2(2) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985 (Act 320) prevents the recognition and enforcement in Malaysia under the Act (Act 320) of an arbitral award handed down in the United Kingdom;

(b) whether the Court of Appeal acted correctly in law in holding that the failure to declare United Kingdom by order in the *Gazette* as a contracting state to the New York Convention deprives the High Court of Malaya of jurisdiction pursuant to s 3 of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985 to enforce an award handed down by arbitral tribunal whose seat of arbitration was in the United Kingdom in an arbitration governed by the New York Convention;

(c) whether the definition of a 'convention award' under s 2(1) must be read together with s 2(2) for purpose of enforcement under s 3 of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985; and

(d) whether the Court of Appeal acted correctly in deciding that s 2(2) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985 was a piece of conditional legislation (ie that it is conditional upon the Yang di-Pertuan Agong to issue a *Gazette* notification before a state can qualify as a contracting state under the New York Convention).

[12] As suggested by appellant's counsel, I agree that the four questions may be reduced into a single question which reads as follows:

> Does the failure of the Yang di-Pertuan Agong to issue a *Gazette* notification pursuant to s 2(2) of the CREFA declaring the United Kingdom to be a party to the New York Convention render a convention award made in the United Kingdom unenforceable in Malaysia, notwithstanding the fact that all the conditions ordinarily required for the enforcement of the said award under the CREFA have been satisfied?

CREFA

[13] CREFA came into force on 3 February 1986. The purpose of the CREFA is expressed in the preamble to the Act to give effect to the provisions of the NYC on the Recognition and Enforcement of Foreign Arbitral Awards. 'Convention award' is defined in s 2(1) of the CREFA which reads:

> 'Convention Award' means an award on differences between persons arising out of a defined legal relationship, whether contractual or not, considered as commercial under the law in force in Malaysia made —
>
> (a) In pursuance of an arbitration agreement to which the New York Convention applies; and
>
> (b) In pursuance of an arbitration agreement in the territory of a State other than Malaysia, which is a party to the New York Convention;

[14] The scope of the NYC is extensive, thus an arbitral award in any foreign country, whether in a contracting state or not is covered by the NYC. However, Article 1(3) of the NYC gives a contracting state two options either to apply the convention to awards made only in the territory of another contracting state on the basis of reprocity and to restrict its application to differences considered as commercial. Malaysia ratified the NYC on 15 November 1985 and it came into force on 3 February 1986, while the United Kingdom ratified the NYC on 24 September 1975 and it came into force on 23 December 1975. Under Article 111 of the NYC, it is provided that each contracting state shall recognise arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where these awards are relied upon. It was not in dispute that the said award was a convention award as defined in s 2(1) of the CREFA.

THE ISSUES

[15] Before the Court of Appeal, the respondent by letter dated 14 January 2008 raised a preliminary objection contending that:

> That the Respondent was not entitled to commence or enforce the Arbitral Award dated 10.07.2002 as the United Kingdom was not a gazetted state within the meaning of Section 2(2) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985 ('CREFA').

[16] Holding that the court is bound by its earlier decision in *Sri Lanka Cricket (formerly known as Board of Control for Cricket in Sri Langka) v World Sport Nimbus Pte Ltd (formerly known as WSG Nimbus Pte Ltd*, the Court of Appeal upheld the preliminary objection.

[17] Learned counsel for the appellant contends that the *Sri Lanka Cricket* was wrongly decided. He mounted several grounds in support of his contention. The decision in *Sri Lanka Cricket* case turns essentially on the effect to be given to s 2(2) of the CREFA which reads:

> s 2(2) The Yang Di Pertuan Agong may, by order in the Gazette, declare that any State specified in the order is a party to the New York Convention, and that order shall, while in force, *be conclusive evidence that that State is a party to the said Convention*. (Emphasis added.)

[18] In that case, the arbitration was conducted and an award made in Singapore. The plaintiff sought to enforce the arbitral award in Malaysia. The High Court ruled in favour of the plaintiff. This was overturned by the Court of Appeal on the sole ground that as there was no *Gazette* notification made under s 2(2) of the CREFA declaring Singapore as a party to the NYC, therefore, the plaintiff could not rely on the CREFA to enforce the award.

[19] The Court of Appeal held, inter alia, that the word 'may' in s 2(2) when read in the context of s 2 and indeed the whole Act must be construed to mean 'must'. Therefore, if His Majesty the Yang Di Pertuan Agong wishes to extend the benefit under s 3(1) to a particular award, it is mandatory for His Majesty to declare the country through a *Gazette* notification to be a party to the Convention. Since His Majesty did not do so, therefore, the benefit under the CREFA is not available to the plaintiff in *Sri Lanka Cricket*'s case.

[20] The reasons given by Gopal Sri Ram JCA (as he then was) in *Sri Lanka Cricket*'s case are as follows:

> In the first place, the word 'may' when read in the context of s 2 and indeed the whole Act means 'must'. If His Majesty (in effect the Federal Cabinet by virtue of art 40(1) of the Federal Constitution, see *Teh Cheng Poh v Public Prosecutor* [1979] 1 MLJ 50) wishes to extend the benefit of the summary method of enforcement provided for by s 3(1) to a particular award then it is logical that he must by *Gazette* notification declare the country in which that award was made to be a party to the Convention. If His Majesty elects not to do so, then that benefit is not available to the party seeking enforcement.

[21] The critical issue is whether a declaration in the *Gazette* notification by the Yang Di Pertuan Agong is a condition precedent before an award made in a state, who is a party to the NYC, could be regarded as a convention award under the CREFA. In my view, the answer to this question does not depend on whether the word 'may' appearing in s 2(2) of the CREFA has to be read to mean 'must' or otherwise. As observed by Cotton LJ in *In re Baker; Nichols v Baker* (1890) 44 Ch D 262 at p 268, 'It is an inaccuracy of language

to say that 'may' can mean 'must' or 'shall'. It simply confers a power. We must look at the object of the statements to see whether a duty to exercise the power is imposed'.

[22] In NS Bindra's *Interpretation of Statutes* (9th Ed) at p 948, it is stated that:

> It is well-settled that the use of word 'may' in a statutory provision would not by itself show that the provision is directory in nature. In some cases the legislature may use the word 'may' as a matter of pure conventional courtesy and yet intend a mandatory force. In order, therefore, to interpret the legal import of the word 'may', the court has to consider various factors, namely, the object and the scheme of the Act, the context and the background against which the words have been used, the purpose and the advantages sought to be achieved by the use of this word, and the like.

And at p 950 it is stated:

> The ultimate rule in construing auxiliary verbs like 'may' and 'shall' is to discover the legislative intent; and the use of words 'may' and 'shall' is not decisive of its discretion or mandates. The use of the words 'may' and 'shall' may help the courts in ascertaining the legislative intent without giving to either a controlling or a determinating effect. The courts have further to consider the subject matter, the purpose of the provisions, the object intended to be secured by the statute which is of prime importance, as also the actual words employed.

[23] Considering s 2(2) of the CREFA, I find there is much force in the contention of the appellant. It is to be noted that s 2(2) of the CREFA merely provides that if the Yang Di Pertuan Agong has issued a *Gazette* notification declaring a particular state as a contracting state, the *Gazette* notification can be relied upon by the parties as forming conclusive evidence of the fact that the state is a contracting state under the NYC. Hence, the provision is evidential in effect. Learned counsel for the appellant drew support from the English case of *Minister of Public Works of the Government of Kuwait v Sir Fredrick Snow and Partners* [1981] 1 Lloyd's Rep 656. That case was concerned with the interpretation of s 7(2) of the English Arbitration Act 1975, which is similar to our s 2(2) of the CREFA. Section 7(2) reads:

> If Her Majesty by Order in Council declares that any State specified in the Order is a party to the New York Convention the Order shall, while in force, be conclusive evidence that that State is a party to that Convention.

[24] Mocatta J in his judgment drew a distinction between the terms 'conclusive evidence' and 'exclusive evidence'. This is what he said:

> *The word used in the Act is 'conclusive' and not 'exclusive'* and the language of s 7(2) is to be contrasted with that of s 35(1) of the 1950 Act where the language used makes the relevant orders in council essential. In addition to this striking contrast between the two Acts, Mr Phillips was able to refer me to *A-G v Bournemouth Corporation* (1902) 71 LJNS 731, where it was held that a provision in the Tramways Act 1870, that a notice by the board of trade in the London *Gazette* 'shall be conclusive evidence' of the non-commencement of works, was not the exclusive or only evidence of the non-commencement of the works which the court could receive. (Emphasis added.)

[25] Although on appeal Mocatta J's decision that an arbitration award made in Kuwait was not a convention award was reversed but his observation as stated above was not challenged in the Court of Appeal.

[26] The term 'conclusive evidence' was also used in s 5 of the Chief Minister (Incorporation) Ordinance of Sabah (Sabah Cap 23) ('the Ordinance') which stipulates:

> A notification in the Gazette of the appointment of any person to hold or act in the office of Chief Minister, State of Sabah, shall be *conclusive evidence* that such person was duly so appointed. (Emphasis added.)

[27] In *Tun Dato Haji Mustapha bin Datu Harun v Tun Datuk Haji Mohamed Adnan Robert, Yang Di-pertua Negeri Sabah & Datuk Joseph Pairin Kitingan (No 2)* [1986] 2 MLJ 420, Tan Chiaw Thong J opined that s 5 of the Ordinance was merely evidential in nature. He said 'It is apparent that it is primarily designed to dispense with the need of the proof of the appointment of 'any person to hold or act in the office of Chief Minister, State of Sabah', upon production of a notification in the *Gazette* for the purposes of the Ordinance'.

Black's Law Dictionary (7th Ed) at p 577 defines 'conclusive evidence' as evidence so strong to overbear any other evidence to the contrary. And it defines 'exclusive evidence' as the only facts that have any probative force at all on a particular matter in issue. Section 2(2) provides that notification in the *Gazette* is a conclusive evidence on the issue whether a state is contracting state or not.

[28] On the above premise, I agree with the submission for the appellant that s 2(2) of the CREFA is merely an evidential provision and therefore the issue whether a state is a party to the NYC can be proved by adducing such other evidence as may be appropriate. In the present case, it was never in dispute that United Kingdom is a contracting state under the NYC.

[29] In the *Kuwait* case, the fact that the order in council by the United Kingdom was only made after the enforcement proceedings were commenced was not an issue at all before the Court of Appeal and the House of Lords. Therefore, by analogy, the fact that no *Gazette* notification was ever issued by the Yang Di Pertuan Agong similarly should not be an issue. The only issue for the court to be satisfied is whether, on the date the appellant applied to register the said award before the High Court, the United Kingdom is a contracting state under the NYC.

[30] The scheme of the Act further fortifies the above stated conclusion. Firstly s 2(2) of the CREFA is inserted in s 2 of the CREFA which is the interpretation section, therefore, it is not intended to form part of the substantive provisions of the Act. As stated by the High Court of Australia in Kelly v R (2004) 205 ALR 274:

> *The function of a definition is not to enact substantive law.* It is to provide aid in construing the statute. Nothing is more likely to defeat the intention of the legislature than to give a definition a narrow, literal meaning and then use that meaning to negate the evident policy or purpose of a substantive enactment .... See also *Allianz Australia Insurance Ltd v GSF Australia Pty Ltd* (2005) 215 ALR 385. (Emphasis added.)

[31] In the present case, it is clear that s 2(2) of the CREFA is not an interpretation provision but an evidential provision. The reason why it was inserted in the interpretation section is may be to avoid it from been construed as a substantive provision of the CREFA.

[32] Secondly it is important to see the legislative intent from the general scheme of the Act. Here the legislative intention is declared in the preamble to the Act as:

> An Act to give effect to the provisions of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on the 10th June 1958...

[33] As was observed by Lord Blackburn in *Overseers of West Ham v Iles* (1883) 8 App Cas 386:

> I quite agree with the argument which has been addressed to Your Lordships, that in construing an Act of Parliament where the intention of the Legislature is declared by the preamble, we are to give effect to that preamble to this extent, namely, that it shows us what the Legislature are intending; and if the words of an enactment have a meaning which does not go beyond that preamble, or which may come up to the preamble, in either case, we prefer that meaning to one showing

an intention of the Legislature which would not answer the purposes of the preamble or which would go beyond them. To that extent only is the preamble material.

[34] The NYC is set out in the Schedule to the CREFA. Article 111 of the NYC states, inter alia:

ARTICLE 111:

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles.

And Article IV of the NYC reads:

ARTICLE IV:

(1) To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

(a) the duly authenticated original award or a duly certified copy thereof;

(b) the original agreement referred to in article 11 or a duly certified copy thereof.

(2) If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

[35] Section 4 of the CREFA enacted the provisions of Article IV of the NYC. Whereas s 5 of the CREFA is essentially a reproduction of Article V of the NYC.

[36] I agree with the appellant that considering ss 3 and 5 of the CREFA together with Article III of the NYC one would come to the natural conclusion that enforcement of the convention award may only be refused in the circumstances set out in s 5 of the CREFA.

[37] Section 3(1) of the CREFA stipulates that 'A convention award shall be enforceable in the same manner as the award of an arbitration is enforceable by virtue of s 27 of the Arbitration Act 1952'.

[38] Whereas s 27 of the Arbitration Act 1952 provides:

> An award on an arbitration agreement may, by leave of the High Court, be enforced in the same manner as a judgment or order to the same effect, and, where leave is so given, judgment may be entered in terms of the award.

[39] From the above provisions, it is clear that what was intended by the CREFA was to allow the convention award to be enforceable in this country as if it is a domestic award. I am of the view that this was the clear intention of the Legislature and we have to give effect to this. The Court of Appeal's decision in *Sri Lanka Cricket* would have the effect of imposing an additional condition before a convention award could be enforced in this country.

[40] In my view, that would be contrary to the stated object and purpose of the CREFA. Clearly such a condition is wholly repugnant to Article III of the NYC and undermines the regime for the enforcement of the convention award.

[41] For the above reasons, I am of the view that the *Gazette* notification under s 2(2) of the CREFA could not be construed as a mandatory requirement before the convention award made in a contracting state can be enforced within our jurisdiction. The provision in my view is merely evidential in nature and could not be regarded as a precondition before an award make in a contracting state can be enforced under the CREFA. Therefore, in the event a contracting state has not been gazetted under s 2(2) of the CREFA as was the case here, evidence could thus be led to show that, in fact United Kingdom is a contracting state under the NYC. For this purpose, the United Nations Treaty Collection may be consulted for authoritative status information on the UNCITRAL Convention deposited with the secretary general of the United Nations. As I said earlier, in the present case the fact that United Kingdom is a contracting state under the NYC was never in issue.

[42] The next issue raised by the respondent is that the respondent was never a party to the arbitration agreement. In this regard, I agree with the submission for the appellant that if that is so, it is for the respondent to apply to the English Court, being the court having supervisory jurisdiction, to have the award set aside instead of raising the issue before our court, which is merely an enforcement court.

[43] As observed by Coleman J in *A v B & Ors (No 2)* [2007] 1 Lloyd's Rep 358:

> … an agreement as to the seat of an arbitration is analogous to an exclusive jurisdiction clause. Any claim for a remedy going to the existence or scope of the arbitrator's jurisdiction or as to the validity of an existing interim or final award is agreed to be made only in the courts of the place designated as the seat of the arbitration.

[44] In *Sabah Gas Industries Sdn Bhd v Trans Samudera Lines (S) Sdn Bhd* [1993] 2 MLJ 396, it was similarly held that a party who had been given every opportunity to submit and to take part in arbitration proceedings in London ought to have challenged the conduct of the arbitrator and/or validity of the award in the English Courts and not here. Similarly in *Hebei Import & Export Corp v Polytek Engineering Co Ltd* FAC V No 10 of 1988 (Hong Kong), the Court of Final Appeal of Hong Kong held that a party may be precluded by his failure to raise a point before the court of supervisory jurisdiction from raising that point or issue before the court of enforcement.

[45] For the above reasons, I am in agreement with the appellant's submission that this issue could not be raised in the court here being the court of enforcement. If at all the respondent wanted to raise the issue that the respondent was not a party to the arbitration agreement this must be done in the English courts as the supervisory courts.

[46] On the finding by the Court of Appeal that there had been non-compliance with s 4(b) of the CREFA by the appellant, I agree with the appellant that this issue was never canvassed before the High Court and therefore, ought not to have been entertained by the Court of Appeal. In any event, upon perusal of the affidavit of Wilfred John Ng Wan Yat affirmed on 29 January 2003, one will find annexed to it, the exhibit marked 'A', a certified true copy of the charter party. The arbitration agreement is contained in cl 30 of the additional clauses to the charter party. Therefore, the finding of the Court of Appeal that the appellant failed to comply with s 4(b) of the CREFA is clearly not supported by the evidence before the court.

CONCLUSION

[47] For the above reasons, I would answer the single question posed to us in the negative. In the upshot I would, therefore, allow this appeal with costs both here and in the courts below. The order of the High Court is accordingly reinstated. Deposit to be refunded to the appellant. My learned brother Hashim Mohd Yusoff FCJ has seen this judgment in draft and has expressed his concurrence.

Gopal Sri Ram FCJ:

[48] The facts relevant to this appeal and the issues at stake have been set

out comprehensively in the judgment of my learned brother, the Chief Judge of Malaya. I am therefore spared the task of rehearsing them. The only point that I wish to address is one of statutory construction. It has to do with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985 ('the Act'). The seat of arbitration here was London. The English arbitrator found for the appellant. The broad question that has presented itself for determination is whether an award such as that published in the present case may be summarily enforced under the Act. This very question arose, albeit in a slightly different factual matrix, in *Sri Lanka Cricket (formerly known as Board of Control for Cricket in Sri Langka) v World Sport Nimbus Pte Ltd (formerly known as WSG Nimbus Pte Ltd* [2006] 3 MLJ 117; [2006] 2 CLJ 316. The Court of Appeal of which my learned brother Hashim Yusof and I were members answered the question in the negative. It held that Singapore (which was the seat of the arbitration there) had not been gazetted under the Act as a party to the New York Convention which the Act had been passed to give effect to and the award in that case could not therefore be summarily enforced under the Act. The present appeal therefore tests the correctness of the decision in the in *Sri Lanka Cricket* case.

[49] When construing the Act, one has to begin by examining the common law position before the Act was passed. At common law, an award made at a foreign seat of arbitration vests in the successful party a cause of action to sue upon it. Statute also provided and continues to provide for an alternative mode of enforcement. Thus, it is open to the successful party to have the award registered as a judgment in the jurisdiction in which the award was made and seek its enforcement here under the provisions of the Reciprocal Enforcement of Judgments Act 1958 provided, of course, that the seat of arbitration is in a country that comes within this statute. Before the Act was passed, these alternative methods of enforcement were available to a successful claimant who had a foreign award in his favour.

[50] For the Act to apply, there must first be a 'convention award'. That expression is defined by s 2 as follows:

> 'Convention award' means an award on differences between persons arising out of a defined legal relationship, whether contractual or not, considered as commercial under the law in force in Malaysia made:
>
> (a) In pursuance of an arbitration agreement to which the New York Convention applies; and
>
> (b) In pursuance of an arbitration agreement in the territory of a State other than Malaysia, which is a party to the New York Convention.

This definition in itself contains another expression that requires clarification.

That expression is 'a party to the New York Convention'. To the question, 'who is a party to the New York Convention', the Act provides the following answer in s 2(2):

> The Yang di-Pertuan Agong may, by order in the Gazette, declare that any State specified in the order is a party to the New York Convention, and that order shall, while in force, be conclusive evidence that that State is a party to the said Convention.

So, if you want to discover who, under the Act, is a party to the New York Convention, you must look to the order appearing in the *Gazette*. And once you find it there, then, for so long as that order is in force, it is conclusive evidence that the countries appearing in it are parties to the convention. It follows that if there is no order in the *Gazette*, there can be no question of there being any conclusive evidence about its contents.

[51] It follows from what I have said thus far that a party seeking to enforce a convention award must be able to satisfy a Malaysian court that the award was published in a country that is a party to the New York Convention. And the way it must do that is to produce to the court an order made by the Yang di-Pertuan Agong and published in the *Gazette*. Once that is done, it is conclusive evidence that the country in question is indeed a party to the Convention.

[52] In the present case, all the other requirements of the Act are met and the only question is whether such conclusive evidence as mentioned earlier is available. The answer is that there is none. Because there is simply no order in the *Gazette*. Hence, the summary procedure for enforcement is not available. On this rather simple and obvious ground, I would agree with the Court of Appeal's decision in the present case. I would add that I have found nothing in the arguments of the appellant to persuade me that the view I expressed in the *Sri Lanka Cricket* case is mistaken or erroneous.

[53] For the reasons provided, it is entirely my misfortune that I find myself not in agreement with my learned brother, the Chief Judge of Malaya. I would dismiss this appeal with costs.

Appeal allowed with costs here and below.

Reported by Kohila Nesan